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In the  
**Supreme Court of the United States**

OCTOBER TERM, 1970

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No. 370  
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MAGNESIUM CASTING COMPANY,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

\_\_\_\_\_  
ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

\_\_\_\_\_  
BRIEF FOR MAGNESIUM CASTING COMPANY  
\_\_\_\_\_

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## TABLE OF CONTENTS

	Page
OPINION BELOW .....	1
JURISDICTION .....	2
STATUTES INVOLVED .....	2
QUESTION PRESENTED .....	2
STATEMENT OF THE CASE .....	3
ARGUMENT .....	5
Introduction and Summary .....	5
I. THE NATIONAL LABOR RELATIONS BOARD VIOLATED SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, BY REFUSING TO MAKE ITS OWN UNIT DETERMINATION OR GIVE PLENARY REVIEW TO A REGIONAL DIRECTOR'S UNIT DETERMINATION IN A REPRESENTATION CASE BEFORE ENTERING AN UNFAIR LABOR PRACTICE ORDER BASED ON SUCH DETERMINATION. ....	7
A. <i>The Board improperly abdicated its respon-</i> <i>sibility in Section 10 proceedings to the</i> <i>Regional Director.</i> .....	12
B. <i>The Board improperly extended the scope of</i> <i>the Section 3(b) amendment to the Act be-</i> <i>yond limits set by Congress.</i> .....	16
C. <i>The legislative history of the Section 3(b)</i> <i>amendment reveals Congress' intent to limit</i> <i>its effect to only representation matters.</i> ..	22
II. THE NATIONAL LABOR RELATIONS BOARD DEPRIVED THE COMPANY OF ITS ADMINISTRATIVE RIGHTS UNDER THE ADMINISTRATIVE PROCEDURE ACT. ....	26
CONCLUSION .....	29
APPENDIX .....	31

## TABLE OF AUTHORITIES CITED

## Cases

<i>Acro Corp.</i> , 149 N.L.R.B. 1283 (1964) .....	9
<i>Amalgamated Clothing Workers v. National Labor Relations Board</i> , 365 F.2d 898 (1966) .....	20
<i>Amco Electric v. National Labor Relations Board</i> , 358 F.2d 370 (1966) .....	5
<i>American Federation of Labor v. National Labor Relations Board</i> , 308 U.S. 401 (1940) .....	28
<i>Boire v. Greyhound</i> , 376 U.S. 423 (1964) .....	10, 28
<i>Botany Worsted Mills v. United States</i> , 298 U.S. 282 (1929) .....	25
<i>Cudahy Packing Co. v. Hollard</i> , 315 U.S. 357 (1942) ..	25
<i>Fleming v. Mohawk Wrecking &amp; Lumber Co.</i> , 331 U.S. 111 (1947) .....	22
<i>Gamb'e-Skogmo, Inc. v. F.T.C.</i> , 211 F.2d 106 (1954) ..	15
<i>Insular Chemical Corp.</i> , 128 N.L.R.B. 93 (1960) .....	9
<i>Jan's Services, Inc.</i> , 131 N.L.R.B. 341 (1961) .....	9
<i>Lowell Sun Co. v. Fleming</i> , 120 F.2d 213 (1941), aff'd per curiam sub nom. <i>Holland v. Lowell Sun Co.</i> , 315 U.S. 784 (1942) .....	24
<i>Meyer Bros.</i> , 151 N.L.R.B. 889 (1965) .....	9
<i>Meyer Dairy, Inc. v. National Labor Relations Board</i> , decided August 18, 1970; No. 531-67, 77 L.R.R.M. 3062 .....	5, 9, 16
<i>Nash-Finch Co.</i> , 178 N.L.R.B. No. 77 (1969) .....	9
<i>National Labor Relations Board v. Air Control Products, Inc.</i> , 335 F.2d 245 (1964) .....	14
<i>National Labor Relations Board v. A.P.W. Products Co.</i> , 316 F.2d 899 (1963) .....	29
<i>National Labor Relations Board v. Chelsea Clock Co.</i> , 411 F.2d 189 (1969) .....	16

	Page
<i>National Labor Relations Board v. Clement Blythe Companies</i> , 415 F.2d 78 (1969) .....	5, 16, 26
<i>National Labor Relations Board v. Duval Jewelry Co.</i> , 357 U.S. 1 (1958) .....	21, 22
<i>National Labor Relations Board v. Louisville Chair Co.</i> , 385 F.2d 922 (1967) .....	21
<i>National Labor Relations Board v. Lowell Corrugated Container Corp.</i> , No. 7568, 75 L.R.R.M. 2346 (1970) .....	16, 17, 27
<i>National Labor Relations Board v. Maine Sugar Industries, Inc.</i> , 425 F.2d 942 (1970) .....	14
<i>National Labor Relations Board v. Majestic Weaving Co.</i> , 355 F.2d 854 (1966) .....	15
<i>National Labor Relations Board v. Olson Bodies, Inc.</i> , 420 F.2d 1187 (1970) .....	5
<i>National Labor Relations Board v. Ra-Rich Mfg. Corp.</i> , 276 F.2d 451 (1960) .....	29
<i>Northeast Airlines, Inc. v. CAB</i> , 331 F.2d 579 (1964) ..	28
<i>Pepsi-Cola Buffa'o Bottling Company v. National Labor Relations Board</i> , 405 F.2d 676 (1969), cert. denied 396 U.S. 904 (1969) .....	5, 12, 16
<i>Phelps Dodge Corp. v. National Labor Relations Board</i> , 313 U.S. 177 (1941) .....	28
<i>Pittsburgh Plate Glass Co. v. National Labor Relations Board</i> , 313 U.S. 146 (1941) .....	19, 20
<i>Ramspeck v. Federal Trial Examiners Conference</i> , 345 U.S. 128 (1953) .....	27
<i>Riverside Press, Inc. v. National Labor Relations Board</i> , 415 F.2d 218 (1969) .....	20
<i>Shreveport Packing Corp.</i> , 141 N.L.R.B. 1255 (1963) ..	20
<i>Sopps, Inc.</i> , 175 N.L.R.B. No. 49 (1969) .....	9
<i>Thrifty Supply Co.</i> , 153 N.L.R.B. No. 34 (1965) .....	20
<i>United States v. Watashe</i> , 102 F.2d 428 (1930) .....	25

	Page
<i>Universal Camera Corp. v. National Labor Relations Board</i> , 340 U.S. 474 (1951) .....	8, 12
<i>Wong Yang Sung v. McGrath</i> , 339 U.S. 33 (1950) .....	27

### *Statutes*

Administrative Procedure Act, 5 U.S.C. § 551 et seq. . .	2, 6, 29
§ 554(a) (6) .....	27
§ 557(b) .....	15
§ 557(c) .....	26
28 U.S.C. § 1254 .....	2
National Labor Relations Act, 29 U.S.C. § 151 et seq. .	2, 29
§ 2(3)	
§ 2(11)	
§ 3(b) .....	5, 6, 16, 17, 19, 20, 22, 25
§ 3(d) .....	16
§ 8(a) (1) .....	10
§ 8(a) (5) .....	10
§ 9 .....	6, 9, 19, 23
§ 9(c) .....	8, 18
§ 10 .....	6, 7, 10, 12, 19
§ 10(b) .....	13, 18
§ 10(c) .....	6, 7, 8, 13, 16, 18, 28
§ 10(e) .....	2, 6
§ 10(f) .....	6, 28
§ 11(l) .....	21

### *Miscellaneous*

Board's Field Manual, Section 11022.3a .....	9
--	---

	Page
Board's Rules and Regulations, Series 8, as amended 29 C.F.R.	
102.64 .....	14
102.67(e) .....	3, 8, 13, 18
102.67(d) .....	8
107 Congressional Record 10223, 12905-32 (1961) .....	26
Gellhorn & Byce, <i>Administrative Law—Cases and Com- ments</i> 1128 (1954) .....	24
2 N.L.R.B. Legislative History of the Labor Manage- ment and Disclosure Act of 1959 (1959)	
426 .....	24
1327(2) .....	22
1452(1) .....	23, 25
1460(1) .....	23
1465(2)(3) .....	23
1714(3) .....	23
1722(3) .....	23
1749(3) .....	23
1750(1) .....	23
1811(3) .....	23
1811-1812 .....	18
1818(1) .....	23
1830(2) .....	23
1856(1-2) .....	23
Reorganization Plan No. 5 of 1961, 107 Congressional Record 8217 (H. Doc. No. 172) .....	25
<i>Report on Case Handling Developments at National Labor Relations Board</i> (Quarter ending June 30, 1966), Labor Relations Yearbook — 1966, published by Bureau of National Affairs, Inc. ....	9

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BRIEF FOR MAGNESIUM CASTING COMPANY

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**Opinion Below**

The Opinion of the United States Court of Appeals for the First Circuit (A. 200) is reported at 427 F.2d 114 (Appendix, p. 31)<sup>1</sup>

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<sup>1</sup> "A." refers to the Single Appendix. "Appendix" refers to the Appendix at the end of this Brief.

## **Jurisdiction**

The application for enforcement of an order of the National Labor Relations Board was filed by the Board on November 12, 1969 under the authority of 29 U.S.C. § 160(e). The judgment of the Court of Appeals was issued on May 21, 1970. The Company filed a motion for stay of mandate pending its petition for writ of certiorari on May 29, 1970, and the Court of Appeals issued an order on the same date staying its decree to and including July 10, 1970. On July 9, 1970, the Company filed its petition for writ of certiorari, invoking the jurisdiction of the Supreme Court under 28 U.S.C. § 1254. Certiorari was granted on October 12, 1970.

## **Statutes Involved**

The relevant statutes are the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.) (hereinafter called "the Act"), and the Administrative Procedure Act, as amended (60 Stat. 257, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551 et seq.).

## **Question Presented**

Did the National Labor Relations Board violate the National Labor Relations Act, as amended, and the Administrative Procedure Act, as amended, in finding that the Company unlawfully refused to bargain with a newly-certified union, where the Board denied the Company's request for review of the Regional Director's unit determination in a representation proceeding and the Board refused to make its own determination or give plenary review to the Regional Director's determination before entering an unfair labor practice order based on such determination?

### Statement of the Case

Upon petition for certification of collective bargaining representative of the Company's production and maintenance employees filed pursuant to Section 9(c) of the Act by the United Steelworkers of America, AFL-CIO, hereinafter called "the Union", a hearing was held on April 4, 8, 12 and 18, 1968, before a hearing officer designated by the Regional Director for the First Region of the National Labor Relations Board, hereinafter called "the Board". At issue in the hearing was the exclusion of assistant foremen as supervisors, within the meaning of Section 2(11) of the Act.

Among the employees sought by the Company to be excluded from the unit as assistant foremen was Ivory Scott, who the Company alleged had illegally and actively participated in soliciting not only support for the Union amongst the employees, but also authorization cards for the Union in support of its efforts to obtain a sufficient showing of interest to support its representation petition.

The Regional Director in his Decision and Direction of Election, issued on May 2, 1968, determined that all but one assistant foreman, that exception *not* being Ivory Scott, were employees within the meaning of Section 2(3) of the Act and were not supervisors (A. 110).

Pursuant to the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.67(c)(d) (Appendix, pp. 46-47), on May 31, 1968, the Company filed a request for review on the basis that the Regional Director's Decision that the three men, including Ivory Scott, were not supervisors was clearly erroneous on the record and such error prejudicially affected the rights of the Company (A. 117). The Board denied the request for review, stating it raised "no substantial issues warranting review" (A. 127), thus leav-

ing the Regional Director's Decision as the only determination made on the merits of this crucial issue.

An election was held on June 21, 1968, in which a majority of those in the unit voted for the Union and the results were certified on October 11, 1968 (A. 131).

Seeking to secure a hearing before the National Labor Relations Board on the issue of the assistant foremen's exclusion as supervisors, especially in the case of Ivory Scott, the Company declined to bargain with the Union.

On November 8, 1968, the General Counsel on behalf of the Board issued a Complaint against the Company, alleging the Company illegally refused to bargain (A. 138). The Company answered, denying that the appropriate unit should include assistant foremen and alleging that the showing of interest obtained by the Union to support its petition was sufficiently tainted by solicitation on behalf of the Union by a Company supervisor so as to warrant dismissal of the petition and revocation of the Certification of Representative (A. 145).

Thereafter, on December 3, 1968, General Counsel without presenting any evidence moved for Summary Judgment. The Company in its Reply to Show Cause Order again raised the issue that the Regional Director erred in concluding the three assistant foremen were not supervisors (A. 147). The Trial Examiner in his Decision issued January 28, 1969 (A. 157) granted the Motion for Summary Judgment without permitting any opportunity for a hearing. On April 17, 1969, the Board issued its Decision and Order (A. 185), affirming without comment the rulings, findings, conclusions and recommendations of the Trial Examiner. At no point in the Trial Examiner's Decision or the Board's Decision and Order was an independent determination made concerning the appropriate bargaining unit.

The Company filed a Motion for Reconsideration on April

29, 1969 (A. 186), on the basis that the Board's failure to review the record before the Regional Director in order to make its own decision as to whether or not the three assistant foremen were supervisors within the meaning of the Act was unlawful, citing *Pepsi-Cola Buffalo Bottling Company v. National Labor Relations Board*, 409 F.2d 676 (C.A. 2, 1969), cert. denied, 396 U.S. 904 (1969). The Board denied the motion "as lacking merit" and stated that with "due deference" to the *Pepsi-Cola* decision, the Board "disagrees therewith and adheres to its previous position until such time as the Supreme Court of the United States rules otherwise" (A. 190). As noted above, this Court denied certiorari in *Pepsi-Cola*.

Upon the Board's application for enforcement, the United States Court of Appeals for the First Circuit enforced the Board's order. In so doing, the Court specifically disagreed with the Second Circuit's *Pepsi-Cola* decision and the Second Circuit's modification of *Pepsi-Cola* in *National Labor Relations Board v. Olson Bodies, Inc.*, 420 F.2d 1187 (1970), and with the Fourth Circuit's decision agreeing with *Pepsi-Cola* in *National Labor Relations Board v. Clement Blythe Companies*, 415 F.2d 78 (1969)<sup>2</sup>.

The Company filed a motion for stay of mandate on May 29, 1970, said motion being granted that same day. On October 12, 1970, the Supreme Court granted certiorari.

## Argument

### *Introduction and Summary*

In 1959 the Congress amended Section 3(b) of the Act (Appendix p. 44) by authorizing the Board "to delegate to

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<sup>2</sup> Since the petition for writ of certiorari was filed, the United States Court of Appeals for the Tenth Circuit in *Meyer Dairy, Inc. v. National Labor Relations Board* decided August 18, 1970, No. 531-69, 77 L.R.R.M. 3062 agreed with the First Circuit's decision in the immediate matter.

its regional directors its power under Section [9 of the Act] . . . to determine the unit appropriate for the purposes of collective bargaining. . . except that the Board may review any action of a regional director''. The Board in the immediate case did not review the Regional Director's determination in the representation (Section 9) proceedings, and in a subsequent unfair labor practice proceeding under Section 10 of the Act, in which the Board granted summary judgment, adopted the Regional Director's unit determination without giving it plenary review or conducting a trial de novo and based its remedial order to bargain with the Union on this determination.

The Company argued in the Court of Appeals below that Section 10(e) of the Act (Appendix p. 44) requires the Board to make its own determinations of fact in unfair labor practice cases; that Section 3(b) of the Act limited the Regional Director's final authority to rulings only on representation matters (Section 9) and did not constitute a delegation of final authority on any matters involving Section 10 matters (unfair labor practices); that discretionary review by the Board under Section 3(b) is not a sufficient guarantee of the expertise attributed to the Board and necessary to Section 10 proceedings before findings can be made regarding unfair labor practice complaints; that the Administrative Procedure Act, 5 U.S.C. 551 et seq. was violated by the Board because it failed to state the reasons for its conclusions with regard to the unit issue (in fact the Board never reviewed the facts presented on the unit issue at the representation hearing) and that the Court of Appeals, under Sections 10(e) and 10(f) (Appendix pp. 45-46) is limited to reviewing the basis for Board findings, not regional director's decisions.

The Court of Appeals below rejected the Company's contentions, reading into Section 3(b) a broader delegation

than Congress intended, and, we submit, a meaning Congress clearly has sought to avoid.

It is the purpose of this brief to persuade this Court that the Court below was incorrect in holding that the procedures followed by the Board in this case satisfy the requirements of the National Labor Relations Act, as amended and the Administrative Procedure Act, as amended. In the event that this Court reverses the Court below, we request this Court to remand the case to the Court of Appeals with instructions that it not only remand the matter to the Board for proceedings in accordance with this Court's decision, but also that it consider whether an order to bargain is appropriate in view of the delay occasioned by the Board's improper handling of the proceedings and the seventy five percent (75%) turnover of employees which has occurred since the election. (The Court below stated that since the Company's unfair labor practice caused the delay in bargaining after the election, the bargaining order was justified despite the turnover, and the Board was correct in not setting aside the election.)

I. THE NATIONAL LABOR RELATIONS BOARD VIOLATED SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, BY REFUSING TO MAKE ITS OWN UNIT DETERMINATION OR GIVE PLENARY REVIEW TO A REGIONAL DIRECTOR'S UNIT DETERMINATION IN A REPRESENTATION CASE BEFORE ENTERING AN UNFAIR LABOR PRACTICE ORDER BASED ON SUCH DETERMINATION.

The decision of the Court of Appeals condones a procedure prohibited by the specific language of Section 10(c) of the Act by permitting a regional director's findings of fact and decision to be the basis for an unfair labor practice finding without any Board review of that decision or

independent determination of the issues presented in the representation proceeding.

Under Section 10(c) of the Act, the Board must make the ultimate decision whether or not an unfair labor practice has been committed, and it must state its findings of fact before issuing an order to remedy any unfair labor practices it may find. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951). In the immediate case there has been no Board determination of an issue necessary to be resolved before an order to bargain with the Union can be issued. At no time did the Board or Trial Examiner in the entire proceedings take evidence on the issue of assistant foremen as supervisors or review the record before the Regional Director in the representation proceedings in making a determination as to the inclusion in or exclusion from the appropriate bargaining unit of assistant foremen.

A four-day representation hearing, which is an investigatory proceeding pursuant to Section 9(c) of the Act, was held before a field examiner of the regional office of the Board. Following that hearing, a decision was issued by the Regional Director finding certain assistant foremen to be included in the unit (A. 110). Pursuant to the Board's Rules and Regulations, the Company filed a request for review (A. 117) on the issue of assistant foremen, in a "self-contained document enabling the Board to rule on the basis of its contents *without the necessity of recourse to the record*" 29 C.F.R. 102.67(c)(d) (emphasis added) (Appendix, pp. 46-47). Under this Board rule, the Company was required to show that (a) the Regional Director's Decision on a substantial factual issue was clearly erroneous on the record, (b) the error prejudicially affected its rights and (c) there are compelling reasons to grant the request for review. The Board denied the request for review stat-

ing it raised "no substantial issues warranting review" and thereby failed to make its own determination (A. 127).

An examination of the Company's request for review discloses substantial and conclusive evidence to prove Ivory Scott was a supervisor. It is incomprehensible that the Board, judging on the basis of this "self-contained document", could find that the request for review raised "no substantial issue warranting review", with knowledge of the ramifications of a finding that Scott was a supervisor and solicited authorization cards for the Union to support its showing of interest necessary to filing a representation petition under Section 9 of the Act.<sup>3</sup>

The importance of such a finding is based on the Board's prior holdings that an authorization card obtained by a supervisor will not be deemed an uncoerced designation of bargaining authority. *Sopps, Inc.*, 175 N.L.R.B. No. 49 (1969); *Nash-Finch Co.*, 178 N.L.R.B. No. 77 (1969); also *Meyer Bros.*, 151 N.L.R.B. 889 (1965); *Insular Chemical Corp.*, 128 N.L.R.B. 93 (1960); cf. *Aero Corp.*, 149 N.L.R.B. 1283, 1286 (1964); *Jan's Services, Inc.*, 131 N.L.R.B. 341, 345 (1961). In *Report on Case Handling Developments at National Labor Relations Board (Quarter ending June 30, 1966)*, printed in *Labor Relations Yearbook - 1966*, published by the Bureau of National Affairs, Inc., the General Counsel stated on page 288, that in circumstances identical to those the Company alleges in the immediate case:

The General Counsel concluded that the supervisor's manifestations of union support were necessarily weighed by the employees as "coming from the men whose work orders must be obeyed and whose favor

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<sup>3</sup> The Board's Field Manual specifically states in Section 11022. 3a:

A petitioner in order to justify further proceedings on his petition must demonstrate designation by at least 30 percent of the employees in the unit he claims appropriate.

and friendship should, in wisdom, be developed," (*Jan's Services, Inc.* supra, at 345), thus precluding the employees' free choice and coercing them to designate the union as their authorized bargaining agent, despite the absence of evidence of threats or promises. The General Counsel further concluded that, since the union had designated the supervisors as its agents for obtaining authorization card signatures, the coercive impact of these supervisors' conduct was imputable to the union under general principles of agency law, and hence in violation of Section 8(b)(1)(A) of the Act notwithstanding the union may have been unaware of the individual's supervisory status at the time it designated them to act on its behalf . . .

Under the circumstances of the immediate case, the Company refused to bargain with the Union and as expected General Counsel issued a Complaint against the Company alleging a refusal to bargain in violation of Sections 8(a)(1) and (5) of the Act (A. 138). This is the only procedure the Act and the Board's Rules and Regulations provide for in seeking to test a regional director's determination. See *Boire v. Greyhound Corp.*, 376 U.S. 423 (1964); also Section 10 of the Act. Answering the Complaint, the Company reiterated its contention that the assistant foremen, including Ivory Scott, were supervisors and thus should be excluded from the unit and that Scott had solicited authorization cards in support of the Union's representation petition, thus tainting the showing of interest and warranting dismissal by the Board of the Union's petition and revocation of the Regional Director's Certification of Representative (A. 145).

General Counsel then moved for summary judgment, relying on the Regional Director's Decision in the represen-

tation proceeding and stating that issues raised by the Company and determined by the Board in a prior representation case cannot be relitigated in a subsequent unfair labor practice proceeding. The Trial Examiner granted the Motion for Summary Judgment and ordered the Company to bargain with the Union (A. 157).

The Trial Examiner stated in his decision :

Equally the contention that the appropriate unit should have excluded the assistant foreman was litigated before the Board in the representation proceeding (A. 163).

Clearly he relied on the finding of the Regional Director, as he stated in his decision :

With regard to the fact that Scott solicited authorization cards and participated in the Union's organization drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact (A. 164).

This latter remark was erroneous since the Board did *not* decide the issue, but merely refused to review the record in order to make its own decision.

On April 17, 1969, the Board affirmed the rulings of the Trial Examiner and adopted his findings, conclusions and recommendations without discussion (A. 185). Therefore, the Company's decision to risk an unfair labor practice in order to obtain a Board determination on the unit issue went awry, frustrated by the refusal of the Trial Examiner and the Board to review the record independently of the Regional Director's conclusions. It is this failure of the Board which the Company respectfully submits is unlawful.

*Pepsi-Cola Buffalo Bottling Co. v. National Labor Relations Board*, *supra*.<sup>4</sup>

A. *The Board improperly abdicated its responsibility in Section 10 proceedings to the Regional Director.*

Notwithstanding that Section 10(c) of the Act specifically provides that the Board itself must determine if a party has committed an unfair labor practice, the Board abdicated its responsibility in the immediate matter by relying on the ruling of the Regional Director without so much as a review of the transcript elicited at the representation hearing. Discretionary review by the Board at the unfair labor practice case level was *not* contemplated by Congress. *Universal Camera Corp. v. National Labor Relations Board*, *supra*, at 492 (1951). As Judge Kaufman stated in *Pepsi Cola*, *supra*, at 680:

In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a regional director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members. Moreover, the Board's experience is particularly relevant and desirable in deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are invoked. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947); *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485 (1947).

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<sup>4</sup> Respondent moved for reconsideration based on the *Pepsi-Cola* case, but the Board denied the motion, stating it disagreed with the Second Circuit and would adhere to its previous position until this Court rules otherwise (A. 190-191).

The expertise of the Board members is the basis for their selection as agency heads. The record in this case clearly indicates that no review of the hearing transcript occurred by either the Trial Examiner or the Board. In the decision of the First Circuit Court, the Court noted that the Company emphasized that the Board never reviewed the actual evidentiary record in this case, but dismissed the statement as "misleading", noting that the Company had submitted its request for review and "the Board did review the evidence as summarized by the Company" and concluded that the Company's claim presented "no substantial issues warranting review". This statement by the Court, not the statement of the Company, is "misleading". The Company submits that the Board's statement that this request for review raised "no substantial issues warranting review" was incredible in view of the facts presented in the request and the references to the record. Under Section 10(c) of the Act an unfair labor practice must be proven by a "preponderance of the testimony taken"; Section 10(b) of the Act requires the hearing "... to be conducted in accordance with the rules of evidence applicable in the district courts of the United States ...". On the other hand, in a petition for representation, as distinguished from an unfair practice case, the criterion for Board review of a regional director's decision established in 29 C.F.R. 102.67(c) (Board's Rules and Regulations) is limited to situations where a regional director's decision on a substantial factual issue is "clearly erroneous on the record". The Board is not even required to review any part of the record and may make its determination solely on its judgment as to whether the Company's request for review raises "substantial issues warranting review."

In the present case, the denial means that the Board did not review the record before the Regional Director, and the decision of the Regional Director, even if *not* supported

by evidence in the transcript, is binding in the unfair practice procedure. Nowhere in the record does the Board or General Counsel assert that the Board examined the transcript of the representation hearing. Regional directors do not sit as hearing officers in representation proceedings. Rather, a hearing officer designated by the regional director hears the case, but does not write the decision; the decision is written by another person assigned to that task in the regional office who presents a draft to the regional director who may or may not have read the transcript and who may or may not edit the draft before he signs it. Under Board practice credibility resolutions which may be necessary in representation proceedings before a decision may be rendered are made *not* by the hearing officer who is most capable of making those resolutions, but by the decision writer who was not present during the hearing to observe the demeanor of the witnesses or to judge the relative credibility of witnesses whose testimony clearly conflicts. 29 C.F.R. 102.64.

In the case at bar the Company in its Reply to Show Cause Order alleged that it possessed newly-discovered evidence, which it outlined, that witness Ivory Scott admitted after the hearing that he had withheld information concerning his responsibility and authority as assistant foreman during his testimony in the representation hearing. Scott's testimony was strongly in conflict with the evidence presented by the Company. Therefore, the newly-discovered evidence went directly to the issue of Scott's supervisory status and was extremely germane to the credibility resolution necessary to the decision on that issue. The Board's denial of a hearing in the unfair labor practice proceeding deprived the Company of its only opportunity to present such evidence. See *National Labor Relations Board v. Maine Sugar Industries, Inc.*, 425 F.2d 942 (1st Cir. 1970); *National Labor Relations Board v. Air*

*Control Products, Inc.*, 335 F.2d 245, 249 (C.A. 5 1964). Such conduct deprives the Company of a basic administrative right. See 5 U.S.C. § 557(b); *Gamble-Skogmo, Inc. v. FTC*, 211 F.2d 106 (8th Cir. 1954); see also *Amco Electric v. National Labor Relations Board*, 358 F.2d 370 (9th Cir. 1966); *National Labor Relations Board v. Majestic Weaving Co.*, 355 F.2d 854 (2nd Cir. 1966)<sup>5</sup>. Thus the practical effect of the First Circuit Court's decision is not only improperly to condone by the Board delegation of its own Section 10 duties in unfair labor practice cases to regional directors, but in fact to a field examiner or to a field attorney who is an employee not of the Board, but rather of the General Counsel's office — the party originally "prosecuting" the matter before the Board.

It is submitted that Congress certainly did not contemplate that a regional director's determination of an appropriate unit would be binding in an unfair practice proceeding. Nor is there any indication that Congress intended that General Counsel by use of the summary judgment procedure would "rubber stamp" determinations made by regional directors whose hearings are held and decisions made without the application of the rules of evidence. There is no legal warrant for the deprivation of right granted by the Act merely to expedite case handling and to secure consistent results. Such conduct creates a serious conflict of interest as to the regional director for while he does not personally prosecute unfair practice cases, it is not inconceivable that the employees in his office subordinate to him who try unfair practice cases consult with him on stra-

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<sup>5</sup> Section 5(c) of the APA (5 U.S.C. § 557(b)) states that the parties to formal proceedings have the right to have the same officer who presided at the reception of evidence make the recommended or initial decision. Representation proceedings are not subject to this requirement and do not meet this requirement. However, unfair labor practice proceedings are subject to this protection, and therefore the Company was denied this protection.

tegy; his self-interest militates in favor of recommending a motion for summary judgment, thus avoiding any in depth review of his Decision and Direction of Election or a trial on the merits by the Trial Examiner or by the Board. *National Labor Relations Board v. Chelsea Clock Co.*, 411 F.2d 189 (1st Cir. 1969). Clearly such behavior violates the requirement for the separation of Board and General Counsel functions under Sections 3(b), 3(d) and 10(c) of the Act.

*B. The Board Improperly Extended the Scope of the Section 3(b) Amendment to the Act Beyond Limits Set by Congress.*

The crucial issue before the Court is whether Section 3(b) of the Act, which provides a regional director with authority to rule in representation proceedings *only*, relieves the Board of its duty and responsibility to rule on all issues presented in unfair labor practice proceedings. The Court of Appeals in the Second and Fourth Circuits in *Pepsi-Cola*, *supra*, and in *Clement-Blythe*, *supra*, respectively have answered that question in the negative, while the First Circuit in the immediate case and the Tenth Circuit in *Meyer Dairy, Inc. v. National Labor Relations Board*, *supra*, in which the Court cited the First Circuit's opinion, have answered in the affirmative.

The First Circuit recently appears to have contradicted its decision below in the immediate matter in its Opinion in *National Labor Relations Board v. Lowell Corrugated Container Corp.*, No. 7568, September 30, 1970, 75 L.R.R.M. 2346. In the latter case, the Employer refused to bargain in order to test the Regional Director's failure to sustain its objections to an election. The objections claimed that the Regional Director's failure to issue Notices of Election and ballots in Spanish and English was arbitrary and ca-

precious and contrary to Board policy. Although the Court enforced the Board's order because the Employer failed to object at the appropriate time and because of established law on the undisputed facts, nonetheless the Court rejected the Board's contention that it only has to consider new evidence. The Court noted that neither the Trial Examiner nor the Board considered the evidence before the Regional Director and therefore in fact did not review the basis of the Regional Director's action so as to determine its validity prior to the issuance of the Board's order to bargain. The Board argued it does not have to "relitigate" the issue if no new evidence is presented, but the Court stated, *supra* at 2347:

We do not agree that the Board reviewed the rejected matter. Nor do we agree that there is no general duty to do so. Somewhere, sometime, someone must review the basis of the Regional Director's decision to ascertain whether in fact it was arbitrary, or in violation of Board policy or the Act. If the Board is here claiming that it, rather than the trial examiner, does so, we must find that its pro forma decision affirming the examiner's findings and rulings neither recognizes such a duty, nor indicates its performance.

In the case at bar, the Trial Examiner and the Board, like the Trial Examiner and the Board in the *Lowell Corrugated* case, did not review the evidence before the Regional Director to determine its validity. Just as in *Lowell Corrugated*, the Board here neither recognized nor performed its statutory duty in unfair labor practice proceedings.

Under Section 3(b) of the Act the Board may delegate to its regional directors its powers "under Section 9 to determine the unit appropriate for the purpose of collective bargaining ...". Discretionary review is permitted under

the Board's Rules, 29 C.F.R. 102.67(c) on a highly restrictive basis. Nowhere is the Board permitted to delegate its final authority in unfair labor practice proceedings, which bear the possibilities of findings of unfair labor practices and of court enforceable remedial orders. Where an integral part of these unfair labor practice proceedings involves a representation matter, the litigants are entitled to the personal attention of the Board members and the reflection of their expertise, which Congress considered in approving their appointments. While Congress permitted regional directors more discretion in representation proceedings, it also provided the added insurance that regional directors' decisions would be subject to ultimate review by the Board. See 2 N.L.R.B. Legislative History of the Labor Management and Disclosure Act of 1959, 1811-12 (1959). By failing to review the Regional Director's decision as to the unit issue and incorporating that decision without review as part of its unfair labor practice findings, the Board has acted contrary to the explicit intent of Section 10(c) of the Act and has deprived the Company of its specific rights as a litigant under the Act and under the Administrative Procedure Act.

As a matter of fact and of law the sole means available to an employer for challenging a regional director's determination in a representation case is by inviting an unfair labor practice by refusing to bargain with the certified union and thereby creating the opportunity for the first time to litigate the matter before the Board. That is the reason the handling of the representation issue is called merely an "investigation" by the Act and by the Board and the rules of evidence are not applicable. See Sections 9(c) and 10(b) of the Act.

Although the Board argued in its brief to the First Circuit Court (and the Court accepted the Board's position) that representation and unfair labor practice proceedings

are "really one and a single trial of the representation issue is enough", relying on *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U.S. 146 (1941), it is clear not only from a reading of the Act, but also from the same case the Board cites that the Board in fact must make a determination of *its own* on the unit issue when it becomes a relevant issue in an unfair labor practice proceeding. Section 3(b) of the Act, which was a post-1941 amendment to the Act, permits the Board to delegate its authority to a regional director only in representation matters. The sole purpose of this delegation was to expedite the election process so as to determine matters affecting representation as promptly as possible. At the time of the *Pittsburgh Plate Glass* case, in 1941, the Section 3(b) delegation to the regional director of Section 9 powers did not exist, so no contemplation was made of an occasion when the Board would not rule on a unit issue in an unfair labor practice proceeding. In *Pittsburgh Plate Glass* the Board itself in fact did rule on the unit issue. Clearly the Board would not be required to rule twice on the same evidence on the unit issue. But the Board is required to rule *at least once* on the unit issue! Furthermore, the Administrative Procedure Act (1947) had not been enacted at the time *Pittsburgh Plate Glass* was decided (1941). The only argument raised in that case was a denial of the right to a hearing in violation of the Fifth Amendment.

The First Circuit Court stated that the Company's argument "overlooks the well established principle that when the Board resolves an issue in the representation proceeding under its Section 9 powers, it is not required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under Section 10, footnoting that the Board may make determinations if it accepts a request for review or a transfer of the case directly to it by the regional director, and citing *Pittsburgh Plate Glass supra*,

*Amalgamated Clothing Workers v. National Labor Relations Board*, 365 F.2d 898, 902-904 (D.C. Cir. 1966) and *Riverside Press, Inc. v. National Labor Relations Board*, 415 F.2d 281, 284 (5th Cir. 1969). We discussed the *Pittsburgh Plate Glass* case above. In *Riverside Press, Inc. v. National Labor Relations Board*, supra, the Employer did not make an effort to have the Trial Examiner or the Board review the decision of the Regional Director and the issue was not raised. In *Amalgamated Clothing Workers v. National Labor Relations Board*, supra, the Employer, unlike the present case, neglected to seek a Board determination of the unit issue in the representation proceedings and was thus precluded from raising it before the Board in the unfair labor practice case, such failure constituting a waiver; however, as that case points out, even trial examiners are in dispute as to the intent of Section 3(b). Compare *Thrifty Supply Co.*, 153 N.L.R.B. No. 34 (1965) with *Shreveport Packing Corp.*, 141 N.L.R.B. 1255, 1259 (1963). The Board affirmed both Trial Examiners' decisions, without any opinion or comment.

In the *Amalgamated Clothing Workers* case, the Court points out that where the charge is based on issues not so closely related to the unit issue in the refusal to bargain charge as to make the unit issue the sole issue, the Employer should not be foreclosed from presenting to the Board any underlying issues. Here there is an issue going beyond the unit determination, since involved is a question as to the propriety of the Union's showing of interest which is necessary to substantiate its representation petition. If the showing of interest was obtained by improper means, then the petition itself would be subject to dismissal, the results of the election would be nullified and, therefore, no obligation to bargain could exist. See Footnote 3, supra. Whether or not the Company can "relitigate" before the Board should not depend solely on whether the charge involves

issues "so closely related" to the unit issue as to foreclose a hearing de novo or plenary review by the Board of the Regional Director's decision. It must depend also on what defenses are being raised and whether those defenses raise underlying issues which require Board determination. Here the Company sought to raise an issue of extreme importance to the obligation to bargain which was not litigable in the representation proceedings.<sup>6</sup> The Company is thus entitled to the benefit of the Board's expertise on the issue.

The Court below cited *National Labor Relations Board v. Duval Jewelry Co.*, 357 U.S. 1 (1958), where it claims this Court upheld the Board's delegation of some of its authority to an agent. The Circuit Court in the case at bar misinterpreted *Duval Jewelry* when it stated that "recourse to the Board" was solely a matter of the Board's discretion. The Act under Section 11(1) gives a person served with a subpoena duces tecum the right to "petition" the Board to revoke, and provides that "the Board shall revoke the subpoena, if in its opinion" the statutory requirements were not satisfied. In *Duval Jewelry*, after the subpoenas issued in a representation case, the employer petitioned the Board to revoke them. The Board refused, saying the hearing officer must give an initial ruling. The hearing officer heard the motion to revoke, but denied it. No appeal was taken to the Board. The Supreme Court upheld the delegation by the Board of "the right to make a preliminary ruling" on the motion to revoke, emphasizing the Board's

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<sup>6</sup> In *National Labor Relations Board v. Louisville Chair Co.*, 385 F.2d 922, 925 (6th Cir. 1967), the Court stated, in effect, that the question of the showing of interest is subject to litigation only in an unfair labor practice proceeding and not in the investigation of the representation petition. In the immediate case, the hearing officer in the representation hearing specifically directed the Company to litigate the issue not in a representation hearing, but in an unfair labor practice hearing (A. 10). Now the Board seeks to deny the Company that forum.

Rules provided a means for appeal and that the ruling was merely of a preliminary nature. The Court, *supra*, at 7, noted that the hearing officer :

does not, of course, have the final word. Ultimate decision on the merits of all the issues coming before him is left to the Board. That is true of motions to revoke subpoenas duces tecum, as well as other issues of law and fact. That degree of delegation seems to us wholly permissible under this statutory system. We need not go further and consider the legality of the more complete type of delegation to which most of the argument in the case has been directed.

This latter complete type of delegation of which this Court spoke is the type delegation involved herein. Such a complete delegation can neither be implied nor claimed to be specifically authorized by Section 3(b). See *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947).

*C. The Legislative History of the Section 3(b) Amendment Reveals Congress' Intent to Limit Its Effect Only to Representation Matters.*

It is submitted that the Court below misconstrued the legislative history of Section 3 (b) and the intent of Congress. In Congressman Morse's analysis of H.R. 8342, which contains the ultimate language of the amendment to Section 3(b), 2 N.L.R.B. Legislative History of the Labor Management and Disclosure Act of 1959, 1327(2) (1959), he states "The possibility of overloading the NLRB is significantly countered by permitting regional directors to decide representation cases" (as distinguished from unfair practice cases).

Senator Dirksen noted Congress' concern over giving

regional directors substantial authority when he suggested the Senate be provided with confirmation authority to ensure their objectivity and expertise. 2 N.L.R.B. Legislative History, 1452(1). Senator Goldwater agreed. 2 N.L.R.B. Legislative History, 1460(1). In fact, the legislative history talked of the danger of giving the regional officers any of the Board's functions in unfair labor practice matters even though subject to appeal. Remarks of Congressman Smith (Iowa), 2 N.L.R.B. Legislative History 1465 (2) (3).

Congressman Barden specifically stated that the amended Section 3(b) resulted from the House conferees' decision that "*there should be some consideration given to expediting the handling of some of the representation cases*. Therefore the Board is authorized, but not commanded, to delegate to the regional directors certain powers which it has under Section 9 of the (A)ct". 2 N.L.R.B. Legislative History 1714(3). Congressman Udall stated that 3(b) "will enable the Board to handle more cases, and to handle them more expeditiously, by decentralizing its supervision of elections". 2 N.L.R.B. Legislative History, 1722(3). Congressman Kearns noted that the processing of representation cases accounts for more than fifty percent (50%) of the Board's workload and that 3(b) should encourage parties to reach consent agreements on elections. 2 N.L.R.B. Legislative History 1749(3)-1750(1). Congressman Griffin stated that 3(b) "relates only to representation matters". 2 N.L.R.B. Legislative History 1811(3); see also Congressman Hagen's remarks at 2 N.L.R.B. Legislative History 1818(1). Senator Goldwater's comments were addressed to the expedition of Board cases by giving more authority in representation matters to the regional directors. 2 N.L.R.B. Legislative History 1830(2), 1856 (1-2).

In 1958 the Board retained McKinsey & Co., Inc., a firm of management consultants, to survey its internal proce-

dures. That firm found that the Board acted on nearly twenty-five percent (25%) of the representation cases and suggested that new procedures (prehearing elections) could be used so as to reduce the time the Board spends in representation cases so that the "staff time saved could be used to advantage on the anticipated monthly C case load" (unfair labor practice proceedings). S. Rep. No. 187 on S. 1555, 86th Congress, 1st Session, 2 N.L.R.B. Legislative History 426.

The scant legislative history of the amendment reveals that the primary purpose was to expedite *representation matters* so as to leave the Board more time to exert its efforts in unfair labor practice cases. The amendment was specific in its limitations to certain specific powers under Section 9 of the Act. That the Board seeks to extend those specific limitations by its own methods and argues that its position better effectuates Congress' intent is irrelevant. Congress spoke of only representation matters and if it desired to make these findings binding in an unfair labor practice case such as this, it could well have added words to that effect. But the fact remains Congress did not do so! And the legislative history never speaks of making the regional director's decision binding in unfair labor practice cases where the Board, despite the Company's request, has neither granted plenary review nor held a hearing *de novo*. The delegation by the Board in the circumstances of this case exceeds its statutory authority and is therefore *ultra vires* agency. See Gellhorn & Byce, *Administrative Law — Cases and Comments* 1128 (1954).

Where Section 3(b) does not permit delegation by the Board of powers other than those specifically mentioned as Section 9 powers, the Board's delegation of final authority on the unit issue in the immediate unfair practice case trespasses on the function of Congress. *Lowell Sun Co. v. Fleming*, 120 F.2d 213, 216 (1st Cir. 1941), *aff'd per*

curiam sub nom. *Holland v. Lowell Sun Co.*, 315 U.S. 784 (1942). Where the words of the amendment to Section 3(b) are so explicit and the legislative history so clear as to Congressional intent to limit regional directors' authority to representation matters, there is no basis for the Board to interpret Congress' action to have a broader meaning. Senator Dirksen's remarks at 2 N.L.R.B. Legislative History 1452(1) reflect concern that regional directors will not possess that expertise and fairness that are the prerequisites for Board members and are the subject of Congressional inquiry when confirming appointment to the Board. His concern was that those persons below the Board level should not possess the authority reserved to the Board by Congress unless the Senate shall have had the opportunity to interrogate those persons and assure itself of the expertise of those persons. He spoke in the context of legislation widening the authority of the regional director in representation matters only. One can be sure that had he contemplated that a regional director's determination in a representation hearing would go unreviewed by the Board and be the basis of a Board finding of an unfair labor practice, appointments to the office of regional director would have been made subject to Senate confirmation.

As this Court stated in *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929), at 289, "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." Furthermore, where, as here, the delegation of Section 9 power was specific, Congress must, by implication, have intended to limit that delegation and forbid delegation of other powers. *United States v. Watashe*, 102 F.2d 428 (10th Cir. 1939); see also *Cudahy Packing Co. v. Hollard*, 315 U.S. 357 (1942).<sup>7</sup>

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<sup>7</sup> It should be noted that President John F. Kennedy's proposed Reorganization Plan No. 5 of 1961, 107 Cong. Rec. 8217 (H. Doc. No. 172), would have authorized the Board to delegate its authority

## II. THE NATIONAL LABOR RELATIONS BOARD DEPRIVED THE COMPANY OF ITS ADMINISTRATIVE RIGHTS UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The procedure used by the Board in this case does not comply with the Administrative Procedure Act, 5 U.S.C. 557(c), which requires that:

All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record....

The record before this Court contains no Board statement of the reasons or basis for making its findings or reaching its conclusions. That this method of handling an unfair labor practice proceeding is proscribed was stated by Circuit Judge Butzner in *National Labor Relations Board v. Clement-Blythe Companies*, *supra* at 81:

When the Board rules that an employer has committed an unfair labor practice, the employer is entitled to know, and the Board is charged with the duty of stating the reasons why the Board concluded the facts showed a violation of the law, *c.f. Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 195 (1941); 2 Davis, *Administrative Law* § 16.12 (1958).

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in unfair labor practice proceedings to trial examiners, subject to the Board's discretionary right to review the action of the trial examiner upon its own initiative or upon petition of a party to or an intervenor in such proceedings. It was defeated in Congress. 107 Cong. Rec. 10223, 12905-32 (1961). It is only logical that if Congress would not permit a trial examiner's findings of fact and conclusions of law to have final authority in an unfair labor practice proceeding, Congress certainly had not permitted the Board to give such authority to a regional director when it amended Section 3(b) in 1959.

*No statutory exception to this rule exists because critical elements of the controversy were determined preliminarily by the Regional Director in the representation proceedings. The Board, not the Regional Director, has the responsibility of deciding complaints of unfair labor practice. 29 U.S.C. § 169(c) (Emphasis added)*

If the position of the Court below were adopted, the Administrative Procedure Act would be circumvented by permitting certain aspects of unfair labor practice cases to escape its requirements, namely, those issues decided by the regional director, since the Act does not apply to the representation case hearings. The Administrative Procedure Act excludes from its requirements "the certification of worker representatives", 5 U.S.C. § 554(a)(6), and this extends also to the Board's grant or denial of review of a regional director's decision. *National Labor Relations Board v. Clement-Blythe Companies*, supra at 82<sup>8</sup>. When a case involves an unfair labor practice, this Act applies and the Board must state its findings and conclusions and the reasons or basis therefor. Nowhere in the record did the Board state its reasons or basis for a unit determination<sup>9</sup>.

<sup>8</sup> The Administrative Procedure Act was passed to insure the rights of litigants before federal administrative agencies and among other purposes, to guarantee them against the loss of their rights because of an agency's desire to expedite various matters. See *Ramspeck v. Federal Trial Examiner's Conference*, 345 U.S. 128 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

<sup>9</sup> The Court below states that it may review the decision of the Regional Director. Nowhere in the Act is the Court given such reviewing authority. Furthermore, that the trial examiner adopted the Regional Director's findings of fact is inconclusive since there is no evidence the trial examiner even examined the transcript of the representation hearing. See *National Labor Relations Board v. Lowell Corrugated Container Corp.*, supra. In addition, since the Administrative Procedure Act does not apply to a Regional Director's decision

The failure of the Board to make its own determination on the unit issue requires the courts to engage in guesswork or speculation as to whether the Board did in fact review the transcript of the representation hearing prior to denying the request for review and what facts relevant in the record support its denial. No court should be expected to engage in such activity when attempting to review the action of an administrative agency. *Northeast Airlines, Inc. v. CAB*, 331 F.2d 579, 586 (1st Cir. 1964); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197 (1941).

Furthermore, Sections 10(c) and 10(f) of the Act provide Courts of Appeals with the authority to review *only* determinations of the Board and not those of a regional director. This restriction is well-recognized by the courts which have consistently limited parties to the unfair labor practice procedure when efforts are made to test substantive decisions in representations cases in the district courts of the United States. See *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401 (1940); *Boire v. Greyhound Corp.*, *supra*. This statutory review is to be based on whether or not the findings of the Board with respect to questions of fact are supported by substantial evidence on the record.<sup>10</sup> Such a review is more limited than that of the Board reviewing a trial examiner's deci-

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in a representation hearing, when the Regional Director, as he sometimes does, merely states his conclusions and the Board acts as it did here and rules that the issue cannot be relitigated, the protection afforded by the Administrative Procedure Act is in fact rendered meaningless by the decision of the Court below.

<sup>10</sup> The "standard of review" used by the Board to judge whether it should review the Regional Director's decision is whether or not it was "clearly erroneous". The Board was never asked to test the Regional Director's decision on a "substantial evidence" standard and, therefore, the court is being asked not to review a Board determination, which it is empowered to do, but rather to review a Regional Director's decision, which it has *no* authority to do, and to speculate upon what evidence, if any, the Board rested its findings.

sion. *National Labor Relations Board v. A.P.W. Products Co.*, 316 F.2d 899, 904 (2nd Cir. 1963). In the case at bar, neither the Board nor the Trial Examiner at any time indicated that it had reviewed the record before the Regional Director or had made its own findings.

It should also be noted that according to Section 10(c) of the Act the Trial Examiner and the Board must use a "preponderance of the evidence" test in making its findings of fact. Neither the Trial Examiner nor the Board reviewed the evidence in the representation hearing to determine if a preponderance of the evidence supported the Regional Director's decision before recommending and issuing, respectively, an unfair labor practice finding and remedial order. See *National Labor Relations Board v. Ra-Rich Mfg. Corp.*, 276 F.2d 451, 454 (2nd Cir. 1960). The only action the Board took was to find *without* reviewing the record no "clearly erroneous" decision by the Regional Director. Yet, the Court below in discussing the unit issue, after admitting Scott's case "presents more difficulty", says the Court should not substitute its judgment in the close cases and gives "deference to expertise". (A. 204). It is the use of this "expertise" of which the Company was deprived by decision of the Court below, in violation of the National Labor Relations Act, as amended, and the Administrative Procedure Act, as amended.

### Conclusion

It is respectfully submitted that this Court should reverse the Court of Appeals' decision and remand the case to the Court below with instructions that it not only remand the matter to the Board for proceedings in accordance with this Court's decision, but also that it consider whether in any event an order to bargain is appropriate in view of the

delay caused by the Board's improper handling of the proceedings and the seventy-five percent (75%) turnover of employees which has occurred since the election.

Respectfully submitted,

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November 24, 1970

## APPENDIX

[UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT]

No. 7462.

NATIONAL LABOR RELATIONS BOARD,  
PETITIONER,

v.

MAGNESIUM CASTING COMPANY,  
RESPONDENT,

and

UNITED STEELWORKERS OF AMERICA,  
INTERVENOR.APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARDBefore ALDRICH, *Chief Judge*,  
COFFIN, *Circuit Judge*, and BOWNES  
*District Judge*.

*Abigail Cooley Baskir*, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Marshall F. Berman*, Attorney, were on brief, for petitioner.

*Jerome H. Somers*, with whom *Louis Chandler* and *Stoneman and Chandler* were on brief, for respondent.

May 21, 1970.

COFFIN, *Circuit Judge*. On the basis of the evidence adduced at a unit determination hearing on March 14, 1968, the Regional Director concluded that six of the seven assistant foremen whose status was in dispute were employees rather than supervisors and thus includible in the proposed bargaining unit at the Magnesium Casting Company plant in Hyde Park, Massachusetts. The Company's Request for Review, contending that three of the six — Scott, Morris, and Massey — were supervisors, was denied

by the Board as raising no substantial issues warranting review. On June 21, the United Steelworkers of America won the election 140 to 59.

Pursuing the accepted method for challenging such unit determinations, *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-477 (1964), the Company refused to bargain with the Union. The Company's answer to the ensuing unfair labor practice complaint renewed the contention concerning the status of Scott, Morris, and Massey. In response to the General Counsel's Motion for Summary Judgment, the Company asserted the existence of newly discovered evidence concerning Scott's status and his activities on behalf of the Union. The Trial Examiner granted the Motion for Summary Judgment, concluding that the Company's evidence regarding Scott was not newly discovered and thus that the Regional Director's determination in the representation proceeding should be followed. The Board affirmed the Summary Judgment and adopted the Trial Examiner's conclusion that the Company had committed an unfair labor practice by its refusal to bargain.

Thereafter, the Company filed a Motion for Reconsideration with the Board, contending that the holding in *Pepsi-Cola Buffalo Bottling Co. v. N.L.R.B.*, 409 F.2d 676 (2d Cir. 1969), *cert. denied*, 396 U.S. 904 (1969), required the Board to make its own findings of fact regarding the status of Scott, Morris, and Massey. Noting its disagreement with the *Pepsi-Cola* rule, the Board denied the Motion, and comes to us seeking enforcement of its order to bargain.

#### I.

The Company's initial contention is that the inclusion of Scott, Morris, and Massey in the bargaining unit was improper because all three are supervisors within the meaning of the NLRA, 29 U.S.C. § 151 *et seq.* Under section 9 of the Act, only "employees" are properly includible in a bargaining unit, which provision combines with the sec-

tion 2(3) definition of "employee" to exclude from the bargaining unit "any individual employed as a supervisor". Section 2(11) defines "supervisor" as

"... any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, *if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.*" [Emphasis added.]

Since the definition is set forth in the disjunctive, it is generally agreed that the possession of any one of the listed powers is sufficient to confer "supervisory" status, e.g., *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1173 (2d Cir. 1968); *N.L.R.B. v. Little Rock Down-towner, Inc.*, 414 F.2d 1084, 1089 (3d Cir. 1969), as long as "such authority is not merely of a routine or clerical nature, but requires the use of independent judgment". See, e.g., *Amalgamated Clothing Workers v. N.L.R.B.*, 420 F.2d 1296, 1300 (D.C. Cir. 1969).

Nevertheless, as Judge Woodbury stated in *N.L.R.B. v. Swift and Company*, 292 F.2d 561, 563 (1st Cir. 1961),

"... the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor'."

With that in mind, the Regional Director's determination should be sustained if supported by substantial evidence.

The instant case presents one of those situations where

the gradations of authority are particularly difficult to ascertain. The company has approximately 250 employees in the unit found appropriate, some 22 of whom work in the Products Division. Within that Division there are two sections—one for plating and finishing, another for assembly and packaging—each with 10-12 men under the supervision of a foreman, both of whom are conceded to be “supervisors.” It is within these 10-12 man sections that the present controversy arises. The Company contends that all four assistant foremen are also supervisors; the Regional Director found that only Zagrafos—who worked with 9 employees and had exercised supervisory powers on several occasions—was a supervisor, and that Morris, Massey, and Scott were not.

Morris and Massey are employed in the assembly and packaging section of the Products Division. Working with 2-4 others in separate groups, each performs routine supply and inspection functions in addition to the normal packaging work of the section. Both are paid somewhat more than their fellow workers, but substantially less than their foreman. Neither has ever exercised any of the powers specified in section 2(11).<sup>1</sup> Both refer any important decisions to their foreman, who makes the daily work assignments and checks the work of each of the men in the section, including Morris and Massey, at regular 10 minute intervals throughout the working day. Whatever responsibility these assistant foremen may have vis-a-vis their fellow workers, it is of a fairly routine nature; while some judgment is obviously required to determine what problems

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<sup>1</sup> We accept the proposition that possession of section 2(11) authority is sufficient, and that such authority may be possessed even though it has not been exercised. *E.g.*, *N.L.R.B. v. Leland Gifford Co.*, 200 F.2d 620, 625 (1st Cir. 1952); *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra* at 1173. However, in cases where possession of such authority is disputed, lack of exercise thereof is one factor in determining whether or not the authority is indeed possessed.

should be referred to the foreman, such judgments hardly suggest a finding of "supervisory" status. We are troubled by their attendance at bi-weekly "management" meetings but that one factor does not alter the substantial evidence that these men are not supervisors.

Scott presents more difficulty. He is specially trained to perform the critical plating function in the Products Division. During his seven months as an assistant foreman, he once recommended a raise for a fellow worker who soon thereafter received it, and he once prevailed on another employee—by threatened loss of job—not to leave work abruptly in the middle of the day. However, it does not strike us as unusual that the most skilled of three or four men in a shop would command respect from his co-workers and his foreman even though he possessed no "supervisory" powers. Moreover, the quality control work in which he engages concerns the products themselves and only indirectly reflects on his own work and that of the other employees; he is *not* charged with the responsibility of assessing their general capabilities. Compare *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra* at 1174-1177. As with Morris and Massey, however, his frequent attendance at the "management" meetings lends credibility to the Company's contentions.

However, if "deference to expertise" and "substantial evidence" mean anything in this area of labor law, it is that courts should not substitute their judgment in the close cases. We have found only one recent decision where the Board's determination that certain men were not supervisors was reversed by a court of appeals. *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra*; compare *Illinois State Journal-Register, Inc. v. N.L.R.B.*, 412 F.2d 37 (7th Cir. 1969); *N.L.R.B. v. Little Rock Downtowner, Inc.*, *supra* at 1089; *N.L.R.B. v. Swift and Company*, *supra* at 563. *Metropolitan Life* presented a much clearer case of "super-

visory" status than do the inconclusive facts regarding Scott. We hold that the Regional Director's determination with regard to these three men is supported by substantial evidence.

Additionally, the Company contends that the Trial Examiner erred in refusing to consider its "new evidence" concerning the status and activities of Scott. We have just recently demonstrated our readiness to require trial examiners to hear such evidence when appropriately presented. *N.L.R.B. v. Maine Sugar Industries, Inc.* F.2d

(1st Cir., May 15, 1970). However, because of the great potential for delay through this avenue, it is not unfair to require the offeror of such belated evidence to spell out what he has and why he could not have produced it at the appropriate time. The Company's first proffer merely stated that Scott had "admittedly withheld information ... concerning his full responsibilities and authority as an assistant foreman", without in any way indicating what that information was. The Company's other offers of proof seem clearly to address matters within its knowledge at the representation hearing, with no explanation as to why such proof was not then offered. The Trial Examiner's refusal, therefore, was not error.

Since all three disputed workers are employees and thus were properly included in the bargaining unit, the Board's order is supported by substantial evidence and we have no occasion to concern ourselves with Scott's activities on behalf of the Union or with the issue raised in *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra* at 1178.

## II.

Our conclusion above does compel us to confront the issue set forth and discussed in *Pepsi-Cola Buffalo Bottling*, *supra* at 679-681: whether the National Labor Relations Board must make its own findings of fact before it can conclude that a Company has committed an unfair labor

practice by its admitted refusal to bargain. The Board in our case adhered to its "rule against relitigation", which provides in effect that the Board's denial of review of the Regional Director's findings of fact, after review of a summary of the evidence and the law prepared by the Company, is sufficient. 29 C.F.R. § 102.67(d)(f). The *Pepsi-Cola* decision struck down that part of the rule which allows the Board to find an unfair labor practice without making its own findings, which holding has apparently been embraced by the Fourth Circuit. *N.L.R.B. v. Clement-Blythe Companies*, 415 F.2d 78, 82 (4th Cir. 1969). More recently, however, *Pepsi-Cola* has been distinguished by another panel of the Second Circuit, with Judge Friendly expressing his doubts about the *Pepsi-Cola* decision. *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1190 (2d Cir. 1970).<sup>2</sup> Having previously cited *Pepsi-Cola* in dicta as the existing law on this point—*N.L.R.B. v. Chelsea Clock Co.*, 411 F.2d 189, 192 (1st Cir. 1969)—we now must decide whether to follow that decision.

Viewing the problem as *tabula rasa*, there may be some merit to the propositions that discretionary review by the Board is not a sufficient guarantee of the exercise of the expertise attributed to the Board; that section 10(c) of the Act requires the Board to make its own determinations of fact in unfair labor practices cases, see *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 492 (1951); and that Congressional rejection of proposals to delegate final authority to hearing examiners suggests a similar reluctance to delegate such authority to Regional Directors, *Pepsi-Cola Buffalo Bottlers*, *supra* at 681.

But the slate was etched rather clearly, we think, when Congress amended section 3(b) of the Act, 28 U.S.C.

<sup>2</sup> *Pepsi-Cola* has also been distinguished in *State Farm Mutual Auto Ins. Co. v. N.L.R.B.*, 413 F.2d 947 (7th Cir. 1969); see also *N.L.R.B. v. Process Corp.*, 412 F.2d 215, 217-218 (7th Cir. 1969).

§ 153(b), in 1959. Section 3(b) begins by authorizing the Board to delegate to three or more of its members “any and all of the powers which it may exercise”, and then, as amended, provides that “[t]he Board is also authorized to delegate to its regional directors its power under section [9 of the Act] ... to determine the unit appropriate for the purposes of collective bargaining ... except that the Board may review any action of the Regional Director ...” Taken together, the two provisions reflect a Congressional decision to allow the Board — within the specified limits — to permit its delegates to act in its stead.

The Company contends that the section 3(b) amendment *on its face* confines the Regional Directors to the exercise of powers under section 9, and thus that a Regional Director’s unit determination pursuant to section 9 can have no effect in a subsequent unfair labor practice proceeding under section 10. That argument, however, overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers,<sup>3</sup> it is *not* required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10. *E.g.*, *Pittsburgh Plate Glass Co. v. Labor Board*, 313 U.S. 146 (1941); *Amalgamated Clothing Workers v. N.L.R.B.*, 365 F.2d 898, 902-904 (D.C. Cir. 1966); *Riverside Press, Inc. v. N.L.R.B.*, 415 F.2d 281, 284 (5th Cir. 1969). Since the section 3(b) amendment delegated to the Regional Directors the Board’s powers to make unit determinations in representation proceedings, we think it follows that the Director’s determination — when not set aside by the Board — is entitled to the same weight in the subsequent proceeding that the Board’s own determination would have been accorded.

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<sup>3</sup> The Board may be called on to make such determinations, either after accepting a Request for Review or after transfer of the case by the Regional Director. See 29 C.F.R. § 102.67.

The legislative history behind the section 3(b) amendment, while not extensive, confirms the breadth of the intended delegation. Senator Goldwater, a member of the Conference Committee which had inserted this amendment which had not appeared in the bills passed by the House and Senate, offered the most complete explanation for the amendment. The purpose was "to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination." It was made clear that the regional directors would be "required to follow the lawful rules, regulations, procedures, and precedents of the Board and to act in all respects as the Board itself would act." As one safeguard against possible abuse of the delegated power the Board was assured the right of continuous supervision over its delegates, so that the Board could "refuse to delegate authority to handle all or any part of the proceedings in contested representation cases." 2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1856(2) (1959) (Remarks of Senator Goldwater).<sup>4</sup>

We draw two conclusions from the amendment and this history. First, the primary purpose behind the amendment was the desire to expedite the final disposition of a part of the Board's caseload. The Board delegated its authority over elections and certifications, and, by its "rule against

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<sup>4</sup> We note also that both Congressman Griffin—co-sponsor of the House bill and an active advocate for the Conference version which eventually became law—and Congressman Barden—Chairman of the House Committee on Education and Labor whose earlier bills, H.R. 4473 and 4474, contained the first mention of the section 3(b) amendment—inserted brief explanations of the section 3(b) amendment about ten days prior to final passage. 2 NLRB Legislative History, 1811(3), 1812(3). Both focused primary attention on the Board's ability to require adherence by its Regional Directors to its rules and precedents. Were the Board additionally expected to make its own findings, there would be no reason for this concern to be voiced at all.

relitigation'', decided that all issues finally resolved in such proceedings need not be redetermined in the ensuing unfair labor practice proceeding. Thus, while the Company's interpretation — based on *Pepsi-Cola* — would expedite only elections and certifications but not the disposition of the issues resolved therein, the Board's interpretation makes it unnecessary to redetermine each of those issues, thereby effectuating the Congressional purpose more completely.

Secondly, the section 3(b) delegation of authority to the Regional Directors suggests to us a Congressional judgment that the Regional Directors have an expertise concerning unit determinations sufficiently comparable to the Board's expertise that such determinations may be left primarily to the Regional Directors, subject to the Board's discretionary review. Given this determination that the Board's expertise need only be fully brought to bear on those unit determinations which the Board chooses to review, no unfairness arises from the fact that the Regional Director's determination, after denial of review by the Board, is adopted by the Trial Examiner and the Board in the ensuing unfair labor practice proceeding.

Furthermore, it is important to recognize that Congress did build in a second safeguard against possible abuse by the Regional Directors of the delegated powers. 2 NLRB Legislative History, 1811(3) (Remarks of Congressman Griffin); *ibid.*, 1812(3) (Remarks of Congressman Barden). In both the representation proceeding and the unfair labor practice proceeding, the "ultimate decision" remains with the Board, just as much as in *N.L.R.B. v. Duval Jewelry Co.*, 357 U.S. 1, 8 (1957), where the Court upheld the Board's delegation of some of its authority to an agent because "ultimate decisions on the merits of all the issues coming

before him is left to the Board'', although recourse to the Board there, as here, was solely a matter of the Board's discretion.

The Company makes much of the argument that the Board has never reviewed the actual evidentiary record in this case. However, that statement is misleading, for the Board did review the evidence as summarized by the Company in its Request for review, 29 C.F.R. § 102.67(d), and on that basis it concluded that the Company's claims regarding the status of the three assistant foremen presented no substantial issues warranting review. It is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contentions.<sup>5</sup> Of course there is nothing to stop the Board from itself reconsidering the evidence adduced in the representation proceeding which is before it in the unfair labor practice proceeding. *See* 29 C.F.R. § 102.48(b).

The Fourth Circuit, embracing the *Pepsi-Cola* rule, was most persuaded by the absence of any findings by the Board for the courts of appeals to review. *N.L.R.B. v. Clement-Blythe Companies*, 415 F.2d at 81-82. However, both Senator Goldwater's remarks and the Board's own rules make clear that the Regional Director is required to follow the same rules as the Board, so that findings of fact by him must be forthcoming. 29 C.F.R. § 102.67(b). Moreover, the Board's rules make clear that the Regional Director's determinations, if adopted by the trial examiner in the unfair labor practice proceeding, will accompany the case first to the Board—29 C.F.R. § 102.45(a)—and then to the

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<sup>5</sup> The adequacy of this procedure is illustrated by the record before us. The Request for Review contained a complete summary of the relevant evidence, with page references to the transcript of the hearing, as well as a fully documented legal memorandum. In effect, the procedure enables the protestant to marshal its facts and law relevant to the point in issue. If the Board chooses to deny review, its action is one informed by a focused presentation. It cannot fairly be called rubber stamping, with the blind automaticity which the term connotes.

appropriate court of appeals. 29 C.F.R. § 101.14; 29 U.S.C. § 10(d). In the case presently before us, the Regional Director's findings of fact which had been adopted by the trial examiner and by the Board were as complete and "reviewable" as any we have received from the Board. We therefore reject the notion that either section 10(c) of the Act or the Administrative Procedure Act, 5 U.S.C. § 557, is offended by the fact that we review the Regional Director's findings which have been adopted by the Board.

The Second Circuit's recent effort — *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d at 1190 — to confine the *Pepsi-Cola* holding seems to us an unsatisfactory compromise: actual Board review and determination is only required where the issue "is difficult and requires a fine-drawn balancing of facts and law". We shrink from the prospect of attempting such characterizations; in the case before us involving the issue of "supervisory" status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress. We conclude that the Board's expertise was brought to bear to the extent required by section 3(d) when it denied review of the Regional Director's determination.

We therefore part company with both recent decisions of the Second Circuit, and hold that the procedure followed by the Board in this case satisfies the requirements of the National Labor Relations Act, the Administrative Procedure Act, and the demands of procedural fairness.

The Company's final contention is that it should be relieved of its duty to bargain because of a substantial turnover of its employees since the election. The Company's unfair labor practice, its refusal to bargain, having caused this delay since election, the Board's refusal to set aside the election is sustained. *Cf. N.L.R.B. v. Better Val-U Stores of Mansfield, Inc.*, 401 F.2d 491, 494-495 (2d Cir. 1968).

*The petition for enforcement is granted.*

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The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 et seq) are as follows:

SEC. 3 (b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. . . .

SEC. 10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board

shall state its findings of fact and shall issue an order dismissing the said complaint. . . .

SEC. 10 (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

SEC. 10 (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provision of the Board's Rules and Regulations is 29 C.F.R. § 102.67. It provides in part:

*Sec. 102.67 Proceedings before the regional director; further hearing; briefs; actions by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.*

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request

for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

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